Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
	)	
	)	

COMMENTS OF ARIZONA CONSUMERS COUNCIL, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG), COLORADO PUBLIC INTEREST RESEARCH GROUP (COPIRG), COLUMBIA CONSUMER EDUCATION COUNCIL, CONSUMER ASSISTANCE COUNCIL (MA), CONSUMER FEDERATION OF AMERICA, DEMOCRATIC PROCESSES CENTER (AZ), FLORIDA CONSUMER ACTION NETWORK, MASSACHUSETTS CONSUMERS' COUNCIL, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP (NCPIRG), OREGON STATE PUBLIC INTEREST RESEARCH GROUP, (OSPIRG), TEXAS CONSUMERS' ASSOCIATION, THE CONSUMERS' VOICE (IL), US ACTION, VIRGINIA CITIZENS' CONSUMER COUNCIL

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SUMMARY

The groups jointly filing these comments represent a broad array of state and national consumer organizations. We are deeply troubled by the scheme of copy protection that the Federal Communications Commission has put out for comment in this rulemaking. The proposal represents a dramatic attack on the consumer's right to use content that has been legally obtained. The Notice of Proposed Rulemaking in this proceeding rests on faulty policy and legal grounds.

The public policy analysis presented by the Commission identifies the wrong problem and offers the wrong solutions.

- Consumer theft of digital content is not a "key impediment" to the transition to digital TV. The Commission should look to industry foot dragging and the failure to deliver on its obligations and promises as the key problems underlying the rocky transition to digital TV.

- The solution proposed by the Commission – a broadcast flag that severely restricts the ability of consumers to use legally obtained content – would not prevent commercial piracy of digital content, even if it exists.

- Restricting consumers' ability to use new technologies will slow, not speed the transition to digital TV.

The Commission's solution is beyond its legal authority and has evolved from private negotiations that locked the public out of the process and lacks procedural legitimacy.

- The Commission lacks legal authority to deal with copyright issues.

- The Commission's authority attaches only to broadcast licensees and does not provide a legal basis for the Commission to compel equipment manufacturers to install copy protection technologies or software developers to implement copy protection routines.

- The Commission cannot rest its rulemaking on the private negotiation of a small group of powerful content owners and technology companies who propose a copy protection scheme that expands their private market power and promotes their private interests at the expense of the public interest.

- The proposal contradicts the explicit goals of the 1996 Telecommunications Act to promote a vigorously competitive and innovative digital information environment.

Policymakers must not forget that the television is among the most ubiquitous consumer durables in our society. Virtually every household has at least one. On average, Americans spend an immense amount of time (over 35 hours per week) watching TV. Policy mistakes that harm consumers directly, like making the TV more expensive or less useful, will be very visible to and resisted by the public. Policy mistakes that indirectly harm the public, like restricting the functionality of digital media or discouraging innovation, may not be as evident, but they will not go unnoticed. Frustration with the slow speed of the digital transmission is understandable, but that does not justify hammering consumers.

REDUCING CONSUMER FAIR USE RIGHTS IS THE WRONG WAY TO SPEED THE TRANSITION TO DIGITAL TV

THE CONSUMER IS NOT THE CAUSE OF THE ROCKY TRANSITION TO DIGITAL TV

The Commission starts the Notice in paragraph 1 by fretting about the difficulty of the transition to digital television and the slowness with which it is taking place. The Notice claims that "in the absence of a copy protection scheme for digital broadcast television, content providers have asserted that they will not permit high quality programming to be broadcast digitally." The refusal of content providers to make programming available "may be an impediment to the transition's progress" because "without such programming consumers may be reluctant to invest in DTV receivers and equipment, thereby delaying the DTV transition." In paragraph 3 the Commission seeks "comment on whether quality digital programming is now being withheld because of concerns over the lack of digital broadcast copy protection."

That the broadcasters have failed to produce high quality digital content in significant quantities is certain, but whether this is due to a lack of copy protection is less clear. Whether a copy protection scheme would solve the real problem in digital television is completely uncertain because so many other things have gone wrong with the digital transition. The Commission cannot adequately address the role that copy protection would play in speeding the transition from within the confines of this proceeding because it does not address the real causes of the slow transition to digital TV.

When Congress first confronted the problem of phasing out analog TV sets and replacing them with digital TVs, it recognized that a precipitous change could impose substantial harm on the public. On some day in the future, the analog TV sets in people's homes would have to go dark because all signals would be digital. While Congress suggested that the transition to take place by 2006, to minimize the impact it created a market penetration target for digital TVs of 85 percent. If digital TVs had not reached the 85 percent figure, the FCC could extend the deadline for turning the analog lights out. At least in that way no more than 15 percent of the TVs still in consumer's homes would be rendered obsolete.

The logic of the policy was to have programmers and distributors offer ever increasing amounts of programming, which would give consumers incentives to buy digital TVs and replace their analog sets as they aged or broke.[1] The broadcasters were given a gift of spectrum, which was valued as high as $70 billion. Cable operators, who still largely operate

[1] "Comments of the Consumer Federation of America," *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM docket No. 99-360, March 27, 2000, "Reply Comments of the Consumer Federation of America," *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM docket No. 99-360, April 25, 2000, "Statement Of Dr. Mark Cooper on Digital Television," Senate Commerce Committee, March 1, 2001.

as monopolies, were told to create open set top box standards that will ensure that digital cable systems will be compatible with a variety of digital receivers and devices, thereby enhancing competition and keeping down costs to consumers.

Neither the broadcasters nor the cable industry lived up to their part of the bargain. Broadcasters have repeatedly missed their deadlines for rolling out programming and insist on having complete control over taping of digital content before they make much more of it available. Cable operators have dragged their feet on compatibility and competition. Since there is little digital programming out there, consumers have been slow to buy digital sets. Under these circumstances, the 85 percent penetration figure is far off in the distance.

Over the course of the past half-dozen years, the broadcasters have spun out a series of excuses for their failure to live up to the bargain they made when they accepted the gift of digital spectrum. First it was the cost of their own equipment upgrades. Then it was the decision to shift from a strategy that focused on high definition digital TV (HDTV) to a strategy that focuses on standard definition digital TV (SDTV). This led to another delaying tactic; the fight over digital must carry for multiple channels. Now we are told it is the lack of copy protection that restrains programming. Next it will be the lack of a bit stream flag or some other excuse.

Thus, the digital transition is stymied by a variety of factors, in addition to the fact that the broadcasters are on strike over the copy protection issues. These include cost barriers, lack of programming, lack of consumer awareness of the transition, disputes over technological standards and a lack of cable interoperability.

The simple fact of the matter is that the broadcasters and content owners have not figured out a business model that would enable them to totally control the use of their content

or to maximize their returns on the gift of spectrum they were given. They are "on strike" and have been for six years. All the while, the most valuable property in cyberspace lies fallow and untilled. The slow transition must not be used as an excuse to punish the consumer by restricting fair use rights. Rather than kowtow to the demands of the broadcasters to overcome their refusal to produce broadcast digital programming, the Commission could use its authority to promote the public interest to compel broadcasters to produce the programming.

CONSUMERS SHOULD NOT BE PUNISHED BECAUSE BROADCASTERS REFUSE TO UTILIZE THE SPECTRUM THEY WERE GIVEN

Today, consumers have the legal right to make convenient and incidental copies of copyrighted works without obtaining the prior consent of copyright owners. Ever since VCRs and portable tape recorders became available people have been able to make a copy and use it at another time or put it in another device virtually anywhere to play it back. The principle of fair use allows consumers to use this material in this way, **unless the content owner can show that the copyright is being violated.**

Hollywood and the broadcasters want to radically alter this approach to fair use. Essentially, they want to start from the assumption that all use, after the initial viewing, is illegal and then authorize only specific uses and devices. And, they want to hard wire the ban on use into the equipment that records or plays the copyrighted material.

The solution put out for comment by the Commission in paragraph 2 relies on inclusion of an ATCS (broadcast) flag. Under the broadcast flag approach content owners determine in advance, through a technology hard wired into every display device, whether copies are legal and which devices can play a legal copy. TV sets must be designed to make it

impossible to copy a show and send it to a friend or relative over the Internet or make a copy to take to your weekend home. The authorized digital content would have an encrypted or embedded flag. All display devices would be required to have a flag reader. If the flag is not there, or it is the wrong flag, the content would not play. Uncle Joe's content would not play on aunt Mary's DVD player, unless aunt Mary got explicit permission. There are permeations and variations on this approach, but they all amount to the same thing, a complete reversal of the principle of the consumer right of fair use. At best, consumers will have to ask program producers and distributors for permission to copy a program and/or get permission to play a copy on a specific device. More likely, consumers simply will be unable to make copies.

This approach completely destroys consumers legal fair use rights and drives up the cost of consumer electronics. These traditional "fair use" rights are at the foundation of the receipt and use of information by the public. Content protection should not encroach upon legal fair use rights and the ability of consumers to benefit from the flexibility and openness of digital technologies. Thus, we reject the claim of the industry group, repeated by the Commission in paragraph 9, which incorrectly asserts "that the requirements to protect digital output should not interfere with consumers' ability to send DTV content across secure digital networks." The process of pre-approval of devices fundamentally intrudes on the consumer right of fair use.

INCREASING FUNCTIONALITY, USE AND INNOVATION WILL PROMOTE A MORE RAPID, DYNAMIC AND PENETRATING TRANSITION TO DIGITAL TV

The transition from analog to digital television holds great promise for consumers. This value is more than pretty television pictures and enhanced sound but also includes expanding sources of information and interactivity. Enhanced digital services promise new

applications for the disabled as well as services that will raise the level of civic and political discourse.

The main thrust of the Notice is to mandate a frontal assault on consumer fair use rights. We believe this is an anti-consumer policy that will do little to speed the transition to digital TV. By reducing functionality the broadcast flag is much more likely to slow the transition down and leave the new digital media far less innovative and consumer-friendly than they could be. A decade of analysis of the new digital media by the Consumer Federation of America has shown that policies that expand consumer choice with increased options, enhance consumer control, and encourage consumer use speed adoption and stimulate innovation.[2]

Forcing consumers to pay more for less hardly seems to be an attractive strategy for stimulating consumer adoption of a technology.[3] In fact, by regulating how consumers can use the content they legally acquire, this approach to industrial policy will slow the transition and prevent the technology from reaching its potential.[4] A new technology that was supposed to empower consumers and enhance their experience has been turned on its head by the proposed restrictions on the ability to record digital programming for personal use.

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[2] Cooper, Mark, *Expanding the Information Age for the 1990s: A Pragmatic Consumer Analysis*, (Consumer Federation of America and American Association of Retired Persons, January 1990), *Developing the Information Age in the 1990s: A Pragmatic Consumer View* (Consumer Federation of America, June 8, 1992), *A Consumer Road Map to the Information Superhighway: Finding the Pot of Gold at the End of the Road and Avoiding the Potholes Along the Way* (Consumer Federation of America, January 26, 1994), *A Consumer Perspective On Economic, Social And Public Policy Issues In The Transition To Digital Television: Report Of The Consumer Federation Of America To People For Better TV* (Consumer Federation of America, October 29, 1999).

[3] "Letter From Mark Cooper to William Kennard," November 22, 2000, "Letter from Mark Cooper to William Kennard," January 16, 2001.

[4] Cooper, Mark, "Open Access To The Broadband Internet: Technical And Economic Discrimination In Closed, Proprietary Networks," University of Colorado Law Review, Vol. 69, Fall 2000; Cooper, Mark and Christopher Murray, "The Role Of Technology And Public Policy In Preserving An Open Broadband Internet," The Policy Implications Of End-To-End, Stanford Law School, December 1, 2000

Once policymakers accept the reality that it is the bit stream, or flow of electronic data, that must be the vehicle for accelerating the transition to digital TV, the need for an entirely different approach becomes evident. Rather than forcing hardware into the system and reducing functionality, or even providing pretty pictures, the industry must expand consumer horizons. The solution is to enhance and enrich the consumer experience, empowering consumers to participate more fully in the digital experience.[5] That is the true promise of digital technologies. This view echoes the experience of consumers in the information age. Consumers and the economy are best served by open standards and networks that afford them maximum choice, encourage use and promote unfettered innovations by **both** consumers **and** producers.

The broadcast and video industries provide an example of this very point. A couple of decades ago, when the VCR became available, Hollywood was convinced that the ability to record programs would ruin it. If Hollywood had its way, it would have destroyed the functionality of the VCR, just as it proposes today to destroy the functionality of digital recording and display devices. Hollywood failed in its attempt and consumers have been the beneficiaries, with enhanced functionality and choice in viewing entertainment. The industry adjusted its business model and now garners a substantial part of its revenue from VCR tape sales and rentals.

New technologies that empower consumers always threaten the old business models of entrenched industries. They will lobby hard to defend their private interests at the expense of the public. If the Commission gives in, consumers will suffer. In the case of digital

[5] "Open Communications Platforms: Cornerstone of Innovation and Democratic Discourse In the Internet Age," The Regulation of Information Platforms, University of Colorado School of Law, January 27, 2002 (to be published in Journal on Telecommunications, Technology and Intellectual Property).

technologies, they will suffer in three ways. 1) Costs will rise. 2) Industries will assert control over how content is used and enjoyed in the home. 3) The dynamic, innovative environment of the digital media will be chilled and the technology will fall far short of its potential to transform the communications and media industries.

CONSUMERS ARE NOT THIEVES AND TREATING THEM AS SUCH WILL NOT SOLVE THE PROBLEM OF COMMERCIAL PIRACY

THE PROBLEM OF CONSUMER THEFT OF DIGITAL CONTENT HAS NOT BEEN DEMONSTRATED AND THE BROADCAST SOLUTION WILL NOT SOLVE THE REAL PROBLEM

The Commission states in paragraph 1 that "the current lack of digital copy protection may be a be a key impediment" to the digital television transition because "digital media, unlike it analog counterpart, is susceptible to piracy because an unlimited number of high quality copies can be made and distributed in violation of copyright laws." This claim is unsubstantiated. The ability to 'distribute an unlimited number of high quality copies' is presently limited by the huge amount of information required to produce a high quality copy and the limited amount of bandwidth available to the average consumer. Compression technologies that will speed the transfer process will degrade the quality of the copy, rendering the premise of the whole argument incorrect.

At the same time that the broadcast flag is overkill with respect to consumer fair use rights, it would not effectively address the more serious problem of commercial piracy or large scale, organized file sharing. Indeed, the Commission misrepresents the impact of the broadcast flag when it claims that it will "mark digital broadcast programming so as to limit it improper use." Determined commercial pirates will hack around the flag as will sophisticated file sharing operations. Average consumers, who are law-abiding citizens, will find that their legitimate fair use rights have been destroyed and the functionality of their devices restricted

or that they must subject themselves to an intrusive and offensive regime of pre-authorization for use. In fact, because the approach taken by the industry assumes all consumers are criminal, the flag will pervasively limit the proper fair use of legally obtained content while doing little to deter large-scale piracy.

EVEN IF CONSUMER REPRODUCTION OF OVER-THE-AIR SIGNALS WOULD BE SIGNIFICANT, STOPPING IT WILL NOT ACCELERATE THE TRANSITION TO DIGITAL TV, SINCE THE OVERWHELMING MAJORITY OF CONSUMERS NO LONGER RECEIVE THEIR TV SIGNALS OVER-THE-AIR

The misrepresentation of the issue is further demonstrated in paragraph 3, when the Commission links copy protection to the "viability of over-the-air-television" asking

> to what extent would the absence of a digital broadcast copy protection scheme and the lack of high quality digital programming delay or prevent the DTV transition? Would the resulting dynamic threaten the viability of over-the-air television? What impact would this have on consumers?

If this is about only signals received by consumers over-the-air, then the lack of a copy protection scheme cannot be a key impediment in the transition to digital TV, because most households do not use a tuner to get their TV signals over-the-air anymore. They get their TV signal from a set top box hooked to a cable wire or a satellite dish.

When the debate over digital television started in the late 1980s, about half of all households subscribed to cable TV and satellite barely existed. In other words, broadcast was still the predominant means of delivering television, so it made sense to be concerned about digital tuners to receive broadcast signals.

In the past decade, however, the environment has changed radically. Today, almost 85 percent of all households subscribe to either cable or satellite. In fact, there are already twice

as many digital TV subscribers (cable and satellite) as there are broadcast only households.[6] They are capable of receiving digital signals, but programmers and cable operators are providing little digital content.

In order to accelerate the transition to digital programming viewing, we must promote the penetration of digital distribution into the bit stream through cable or satellite, not the broadcast signal.

It makes no sense for this proceeding to be only about broadcast flags and over-the-air TV. It really must be about all forms of distribution of digital TV content and all means of viewing digital TV content. Indeed, in paragraph 6 the Commission seeks "comment on whether and how an ATSC flag would work for broadcast stations carried on cable or direct satellite systems" and "on whether this mandate should include devices other than DTV broadcast receivers… and how downstream devices would be required to protect the content."

Clearly, the issue is not over-the-air TV. Whether the broadcast flag is really a misnomer for the insertion of a flag in all TV programming, or only the first step in the campaign to restrict consumer fair use right is of little consequence. The inclusion of the broadcast flag would only be the starting point. There is no doubt that content owners will insist on a "bit stream" flag as well. The fight for the consumer's fair use rights starts here.

THE PROPOSAL TO MANDATE A BROADCAST FLAG LACKS A LEGAL BASIS

THE COMMISSION LACKS A LEGAL BASIS TO IMPOSE A COPY PROTECTION SCHEME

If the obvious holes in the policy analysis of the broadcast flag are not enough to discredit the rule, the complete lack of a legal foundation should be.

[6] Cooper, Mark, *The Failure of 'Intermodal Competition in Cable and Communications Markets* (Consumer Federation of America and Consumers Union, April, 2002).

Framing the problem as part of an effort to speed the transition to digital TV points directly to the lack of a legal basis for Commission action in the area of copyright. The Commission has no authority to set copyright policy. In fact, the Commission has not claimed a statutory power to implement a copyright protection scheme. Nor could it, since the Commission is not charged by Congress with playing any role in the copyright debate.

Instead, the Commission is trying to enter into the digital copyright issue through a back door – i.e. as a basis to speed the transition to DTV. The Commission is mounting an attack on a fundamental, consumer right, fair use, which has been found to be constitutionally protected, in pursuit of a policy goal – accelerating the transition to digital TV. Ironically, there is not even a clear basis for arguing that the Commission has the authority to speed the transition to digital TV. In this Notice the Commission does not cite any legislative basis for pursuing a policy of speeding the transition to DTV. In short, the Commission is inventing the back door by which it wants to assert jurisdiction over copy protection. Even if there were a strong basis for arguing that the transition to digital TV needs to be accelerated and that Congress gave the Commission the authority to do it, it would be questionable whether it could attack the copyright issue in this indirect way.

THE PROPOSED RULE VIOLATES CLEAR CONGRESSIONAL INTENT FOR ADVANCED TELEVISION SERVICES AND THE INTERNET

In order to create this back door, the Commission must violate the clear intention of Congress. In Paragraph 10 of the Notice, the Commission recognizes that it has a legal problem. It seeks "comment on the jurisdictional basis for Commission rules dealing with digital broadcast television copy protection." It asks whether "this is an area in which the Commission could exercise its ancillary jurisdiction under Title I of the Act?" The reason that

the Commission must look to its ancillary jurisdiction is that the Act provides no explicit basis on which it could order equipment manufacturers to accept a copyright scheme imposed by broadcasters. In fact, the authority granted the Commission "to issue additional licenses for advanced television services" is explicitly limited to broadcasters. The Commission's authority for licenses to broadcast digital TV attaches only to the license. Since it issues no license to equipment manufacturers, it cannot order them to implement specific technologies to protect the copyright of content producers.

The Commission's proposal to empower content owners and equipment manufacturers to exercise greater control over the flow of content on the Internet contradicts Congressional intent in two broader ways. Congress clearly wanted the vibrant and open nature of the Internet to be maintained and, to the extent there were to be any controls, Congress wanted user control to be maximized. The broadcast flag proposal heads in exactly the opposite direction.[7]

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[7] Section

(a) Findings – The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual American represents an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a greater degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities of for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) (5) Increasingly Americans are relying on interactive media for a variety of political, educational and entertainment services.

(b) Policies – It is the policy of the United States --

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals families, and schools who use the Internet and other interactive computer services;

To say that the Commission is overreaching in its effort to assert jurisdiction over copy protection is an understatement. It

- does not have any legislative mandate to deal with copyright,
- lacks a clear mandate to speed the transition,
- has a mandate to regulate broadcast licenses, not equipment, and
- contradicts the intent of Congress to preserve the competitive nature of the Internet, while maximizing user control.

THE PROPOSAL OF THE BROADCAST PROTECTION DISCUSSION GROUP LACKS ANY PROCEDURAL LEGITIMACY

The Commission's notes in paragraph 2 that the Copy Protection Working Groups formed a Broadcast Protection Discussion Subgroup (BPDG) "in order to specially address digital broadcast copy protection." The description in paragraph 2 of the groups and the process by which the flag proposal was developed demonstrates the complete illegitimacy of the enterprise. The Commission states that "more than 70 representatives of consumer electronics, information technology, motion picture, cable and broadcast industries took part in the group." Note who was not invited to participate in the process – consumers, independent artists, librarians, educators, free speech advocates, etc. In other words, the public was excluded from the deliberations. Indeed the deliberations were held behind closed doors from which the press was excluded. This was a Star Chamber deliberation conducted by an unrepresentative handful of self-appointed arbiters without rules or standards of behavior.

The Commission incorrectly claims in paragraph 2 that there was "consensus reached on the technical standards to be implemented." No consensus was reached. There are ongoing disputes about every aspect of the work product of the group.

THE COMMISSION MUST GIVE EQUAL CONSIDERATION TO ALL ALTERNATIVES PROPOSED TO THE BDPG, AS WELL AS NEW APPROACHES DEVELOPED IN RESPONSE TO THIS NOTICE

The BDPG process was dominated by a small number of companies and proceeding without the benefit of fair and objective procedural rules. As a result, this cabal rejected without consideration several alternatives that deserve full Commission consideration. Cognizant of the limited nature of the problem of replication of broadcast digital content and the importance of preserving and expanding the functionality and use of digital media, several companies outside of the core cabal offered alternatives that were much less destructive of consumer fair use rights.

The Notice of Proposed rulemaking failed to even mention these alternatives. Consequently the rulemaking is thoroughly biased from the outset.

THE COMMISSION, NOT AN INDUSTRY RUMP GROUP, MUST TAKE FULL RESPONSIBILITY AND AUTHORITY FOR IMPLEMENTING ANY COPY PROTECTION SCHEME

The closed and biased process within the BPDG demonstrates the danger of allowing an industry group to implement copy protection measures that undermine consumer rights. The Commission admits in paragraph 2 that "final agreement was not reached on a set of compliance and robustness requirements… enforcement mechanisms, or criteria for approving the use of specific protection technologies." It should come as no surprise that the process for approving technologies, controlled by a small cabal that had established an approach that favored their interests, would not be able to make any headway. If the

Commission is determined to intrude on consumer fair use rights, it must start from scratch to identify the least intrusive approach possible and establish an objective and fair procedure for certification and verification that is subject only to its authority.